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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1969

No. 301

LOREN J. PIKE, as Supervisor of Inspection, Arizona Fruit and Vegetable Standardization Service,

Appellant,

vs.

BRUCE CHURCH, INC., a California corporation,

Appellee.

On Appeal from the United States District Court for the District of Arizona

MOTION TO DISMISS OR AFFIRM

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a California corporation,
Appellee.

On Appeal from the United States District Court for the District of Arizona

MOTION TO DISMISS OR AFFIRM

Appellee moves the Court, under Rule 16 of the Court's Rules, to dismiss the appeal herein on the grounds hereinafter set forth, or to affirm the judgment sought to be reviewed, on the ground it is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

The Jurisdictional Statement of the Appellant was received by Appellee on June 28, 1969. Subsequently, an extension of time for the filing of this Motion was

granted by the Clerk under the provisions of paragraph 5 of Rule 34 to August 20, 1969.

The Motion is based in part on procedural deficiencies relating to the appeal and in part on the unsubstantiality of the questions involved.

I

THE APPEAL IS NOT WITHIN THE JURISDICTION OF THIS COURT, BECAUSE NOT TAKEN IN CONFORMITY WITH THE RULES OF THE SUPREME COURT

This Court has declared that a "review of the sources of the Court's jurisdiction is a threshold inquiry appropriate to the disposition of every case that comes before" this Court. *Brown Shoe Co. v. U. S.*, 370 U. S. 294, at 305, 306 (1962).

With respect to the Jurisdictional Statement itself, the Court has provided in Rule 13, paragraph 2, that it "shall comply in *all* respects with Rule 15" (emphasis added).

Examined in light of the matters required by Rule 15 to be set forth "in the order" specified, it will be found that:

1. The Jurisdictional Statement contains no reference to the statute pursuant to which the proceeding was brought, as required by Section 1(b)(i). The "nature of the proceeding" below is only partially indicated.

2. The Jurisdictional Statement fails to state the Court in which the Notice of Appeal was filed, as required by Paragraph 1(b)(ii).

3. The Jurisdictional Statement contains no citation of cases believed to sustain the jurisdiction, as required by Paragraph 1(b)(iv).

4. The Jurisdictional Statement contains no citation of the volume and page where the State statute involved may be found in the official edition, as required by Paragraph 1(b)(v).

The items mentioned do not appear to be set forth anywhere in the Statement.

The deficiencies cited may appear peripheral, yet this Court, in its wisdom, has seen fit to prescribe these rules to be observed where a party seeks to invoke the jurisdiction of the Court on appeal. Unless accompanied by sanctions, the rules can have little significance. By its Rule 16, this Court has expressly provided, as a ground for dismissal, that the appeal has not "been taken in conformity to statute or to these rules."

We submit this is an appropriate case for application of Rule 16.

II

THE QUESTIONS ON WHICH THE DECISION OF THIS CAUSE DEPENDS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT

1. Introductory.

In support of his Jurisdictional Statement, Appellant undertakes to persuade this Court that "the questions presented are substantial" (p. 11, 26). Appellant asserts:

> "Any time that any aspect of an important state statute is declared unconstitutional by a federal court, the issue can hardly be said to be anything but substantial. Similarly, whenever a three judge federal district court interprets an important state statute in such a way as to effectively render it unenforceable, and the only appeal from that interpretation is to this Court, the issue is substantial . . ." (p. 11).

We respectfully submit Appellant mistakes the question now before this Court. The matter before the Court at this time is not whether the issue involved is "a substantial" one. Rather, the question before the Court is whether the issues raised are "so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution" (Rule 15,1(f)). Appellant's formulation of the issue here would ignore completely the criterion established by this Court. Appellant's statement is tantamount to saying that every matter of this nature *must* be accorded a hearing on appeal, without regard to its substantiality as contemplated by the Court's rules. This is indeed a novel proposition which would render the Court's criterion for selective review meaningless.

We respectfully submit Appellant's Jurisdictional Statement fails to set forth any grounds for concluding that the questions presented are of such a substantial nature as to require plenary consideration within the intent of the Court's criterion. No grounds are shown why the decision of the Judges constituting the three-judge Court empaneled by the Chief

Judge of the Ninth Circuit to hear the case, arrived at by unanimous decision and reaffirmed after two motions by Appellant for re-hearing, requires further hearing or argument. We submit there is ample ground for finding to the contrary, that the hearing already afforded Appellant and the decision of the three judges, in line with earlier precedents set by this Court, leaves no issue of such a substantial nature as to require further hearing by this Court.

2. Question presented.

The question presented by this case is clear and simple. It is whether Appellant, a state official acting as Supervisor of Inspection of the Arizona Fruit and Vegetable Standardization Service, and purporting to act under the authority of a statute of Arizona, may, under the facts and circumstances of this case, prohibit Appellee from transporting cantaloupe crops grown by it at Parker, Arizona, across the State line into California, a distance of about 31 miles, for processing and packing at Blythe, California, where Appellee maintains packing sheds and other facilities for that purpose. The record shows that once in California, the produce is processed and packed in accordance with standards and requirements established by the laws of California, which are as stringent, if not more so, than those of the State of Arizona, and that the produce is packed in the very same containers as are in use in Arizona.

The three-judge Court held that to forbid Appellee to so process and pack crops in California imposes an undue burden on interstate commerce, is unconstitu-

tional, and should be enjoined. The Court did not hold the Arizona Act, as a whole, unconstitutional nor did it hold the enforcement provisions of the Act unconstitutional, as suggested by Appellant (Jurisdictional Statement, p. 5). The Court, very clearly addressing itself to the facts of this case, held simply that "If the application of the Arizona Fruit and Vegetable Standardization Act, as interpreted by the Supervisor of Inspection, could be construed to be a valid interpretation and application of the statute, then the statute so interpreted and applied is unconstitutional".

3. The surrounding facts and circumstances.

The pertinent facts of the case were presented to the Court below by stipulation of the parties. We respectfully submit the parties were not "instructed" by the Court to bring in a stipulation of facts, as asserted by Appellant (Jurisdictional Statement, p. 11). Rather, the Court suggested to the parties that they consider the possibility of such a stipulation in this case, a suggestion which counsel for both sides considered an apt one and which they found they could, in deed, effectuate (Transcript of Proceedings, June 7, 1968, p. 33-34). Except for brief court testimony and depositions of Appellant and David R. Gipe, an officer of Appellee, which were made part of the record an appeal, the facts are set forth in detail in this stipulation. We will not undertake to repeat them here. It will be apparent, however, that they are quite extensive and include a description of Appellee's operations, past practice of Appellant in respect of

permitting transportation of cantaloupes across the State line into California for processing and packing, the issuance of the order in question, and its impact upon Appellee.

Briefly, the facts presented to the Court jointly by the parties show that Appellee is an independent, family-owned and controlled company which has been engaged for many years in the growing, harvesting, transporting, processing, packing and shipping of various kinds of fruits and vegetables in the States of Arizona and California. Almost all of its products are produced for sale, and are sold and shipped in interstate and foreign commerce (Stip. p. 3, L. 28 to p. 4, L. 1). Appellee carries on growing and shipping operations at various locations in these States and at such times of the year as to produce a continuing supply of the agricultural products desired by its customers. In this way, Appellee is able to supply cantaloupes, among other commodities, during the entire production season in the growing areas of the West.

Further, by conducting its operations in this manner, Appellee is able not only to increase its production and achieve greater economy and efficiency, but also to effect a more even supply and thereby diminish to some extent the ups and downs of the produce market. This works to the advantage not only of Appellee but also of the buyers and the ultimate consumers insofar as it tends to reduce extreme price fluctuations (Stip. p. 4, L. 13-29).

As part of this operational plan, Appellee finds it advisable to locate its packing and processing estab-

lishments at centralized locations close to rail and air freight facilities which will be adequate to handle the crops from the several nearby growing areas. This is true in the case of growing areas which, although in different States, are within a workable distance of one another, as in the case of Parker and Blythe. The centralized packing facility provides great assurance that produce reaching the markets will be of the highest standards and quality. It also make it possible to train and develop a highly skilled, year-'round labor force which can assist Appellee in maintaining its reputation, which Appellant itself has admitted is "one of the finest in the business" (Stip. p. 5, L. 1-29 and p. 6, L. 21 and 22).

At Parker, Arizona, Appellee has had under development for several years a large tract of land containing over 6400 acres. These are being developed under the terms of an agricultural lease entered into with the Secretary of the Interior of the United States of America, as Lessor, the Commissioner of Indian Affairs, the Colorado River Indian Agency and the Colorado River Indian Tribes, the lease to extend for a period of 25 years. When the lands were taken over by Appellee, they were barren, arid, uncultivated lands in the Colorado River Indian Tribes Reservation at Parker, covered with brush and mesquite. By the expenditure of great physical effort and very substantial sums of money (between three and three and one-half million dollars at the time this matter first came before the Court) Appellee has been able to develop these lands to a point where they have

begun to be productive. The nature and scope of this undertaking is described in more detail in the Stipulation of Facts.

One of the crops developed at Parker is a cantaloupe crop. This was done as part of Appellee's overall plan to develop a continuing supply of high-quality cantaloupes for its trade. For many years past, Appellee has been growing cantaloupes on its farm lands at Yuma, Arizona, and has also been growing cantaloupes in the San Joaquin Valley, the Huron District, and at Mendota, in California (Stip. p. 8, L. 27-30). The Parker District is well suited for the production of a high-quality cantaloupe (Stip. p. 8, L. 26-27), and its maturity and harvest dates fit in well with Appellee's other cantaloupe production schedules. Cantaloupe production at Parker started in 1966 and has continued each year thereafter. In 1968, when this matter came before the Court, the Company had under production there approximately 501 acres, with an estimated crop value of $700,000.00 (Stip. p. 8, L. 23).

Cantaloupes are a highly perishable crop and must be harvested, processed and packed for shipment promptly on reaching maturity, or the crop will spoil and become worthless (Stip. p. 8, L. 17-20). This calls for suitable and adequate processing and packing shed facilities with necessary rail sidings. However, while such facilities have been available to Appellee at Blythe, just across the State line in California, none have existed at the Parker Ranch (Stip. p. 9, L. 15-18). To establish such facilities at Parker

would require more than the expenditure of approximately $200,000.00 for a shed, referred to by Appellant (Jurisdictional Statement, p. 10). It would also require bringing in rail siding for some 20 miles, acquisition of land and easements, and detailed engineering work and development of plans and designs (Stip. p. 9, L. 18 to p. 10, L. 3). Such an expenditure of capital, if made necessary because of the imposition of restrictions such as Appellant seeks to impose here, rather than because of sound economic planning, would materially increase Appellee's costs of production, and would thereby tend to impair its competitive position in the industry (see Stip. p. 12, L. 27-32). Proper planniing in relation to Appellee's operations in the area calls for a centralized facility, capable of handling a variety of crops.

Since it commenced cantaloupe production at Parker in 1966, Appellee has used the facilities at Blythe, California. There, Appellee is afforded a centralized location with necessary railroad facilities for the proper handling of its crops grown in the general area, including the Parker district (Stip. p. 12, L. 18-26). This has enabled Appellee to carry out a more efficient and economical operation, while sending into the markets of the nation a high-grade product at a lower cost to the consumer (see Stip. p. 12, L. 30-32).

In processing and packing its Arizona cantaloupe crops at Blythe, Appellee has been following a practice permitted by Appellant and followed by other growers as well for many years since the Arizona law here in question has been in effect. As the Stipula-

tion of Fact shows (p. 15-16), for many years past various growers and shippers, with the knowledge of Appellant and without objection or complaint by him, his agents or employees, have transported cantaloupe crops as well as other agricultural crops in bulk across the State line of Arizona into the State of California for processing, packing, and further shipment in interstate commerce. This was shown in Appellant's own official departmental reports for the years in question (see Def. Ex. 5 through 18 in Deposition of L. J. Pike). This involved a variety of crops, including cantaloupes, and a number of different growers and shippers in interstate commerce. Actually, the practice antedated the years covered by Appellant's official reports, as indicated in a letter dated September 27, 1968 from the Land Operations Officer, Bureau of Indian Affairs, Parker, Arizona, which is attached to the Stipulation of Facts as Exhibit C. The letter states that "it appears that some melon crop grown on the project has been processed in Blythe, California, every year since 1948".

It was in reliance on this long-continued past practice that Appellee undertook to plant and grow its cantaloupe crops at Parker. Because of the highly perishable nature of cantaloupes, the process of harvesting them, transporting them to the shed facility, processing and packing them is a continuous, uninterrupted and rapid process, accomplished within a matter of a few hours. It has been the practice of Appellant to facilitate this process by causing his inspectors to examine the produce in the field and to

issue an inspection certificate called a "pickle worm inspection certificate", to be delivered to the California Inspector at the State line for clearance into California. This was in conformity with a practice existing at Bard, California, where produce grown in California has been taken across the State line for processing and packing in the State of Arizona. There exists a close liaison between the California and Arizona produce activities. Many growers carry on farming and shipping operations in both states, involving the same crops.

After permitting this practice for years and with full knowledge that Appellee already had its crop in the ground without any processing or packing facilities at Parker capable of handling the crop at harvest time (Stip. p. 17, L. 2-7), Appellant, on March 22, 1968, issued an order prohibiting Appellee from transporting its cantaloupe crops across the State line into California for processing and packing at Blythe (Stip. p. 16, L. 30). Absent necessary facilities at Parker, the order threatened Appellee with loss of its entire crop. The order gave no reasons for its issuance. No grounds or explanation were given. The record shows, however, that the order was directed to Appellee following Appellant's attendance at a meeting of the Board of Directors of the Vegetable Growers Association of Central Arizona. The Association is one of several growers and shipper associations in Arizona. The minutes of the meeting do not show it (Stip. p. 25, L. 4-16) but a principal subject of discussion at the meeting, according to Appellant's own testimony

in deposition, was "the Church Company moving cantaloupes across the line" (Depo. L. J. Pike, June 5, 1968, p. 55, L. 19-20). Appellant had been requested to attend this meeting (Depo. *supra,* p. 45, L. 26), but Appellee was not represented (Depo. *supra,* p. 52, L. 19-21). The record indicates further that following his mailing of the letter to Appellee, Appellant sent a copy to each of the members of the Board of Directors, apparently to inform them of the action he had taken following the meeting. As stated by Appellant: "Well, I sent them because of the fact that I attended a meeting with them when they discussed this situation" (Depo. *supra,* p. 43, L. 19-21). According to Appellant, the letter of notification was sent to certain other growers and shippers who are members of the Association, but it was not sent to all the growers and shippers in the State of Arizona (Depo. *supra,* p. 47, L. 16, p. 48, L. 3). In his deposition, Appellant testified that he had no file copies of the letters he sent except a copy of the letter he sent to Appellee. Asked why he kept a file copy of the letter to Appellee and not the others, he replied, "Well, because at the time, they are the only one in question about it that I knew of" (Depo. *supra,* p. 54, L. 13-16).

That the action was directed at Appellee, and Appellee alone, can hardly be questioned.[1]

[1]On page 8 of the Jurisdictional Statement, Appellant makes statements, unsupported by record evidence, implying that Appellant's action was related to a bill in the Arizona legislature which failed of passage. There is no evidence in the record whatever as to what the terms or provisions of any such Bill were, who "procured" its introduction, what its legislative history

4. Appellant's past practice of permitting out-of-state packing.

Appellant attempts to explain his permission of across-the-line packing in the many years prior to 1968 by arguing that this was illegality of a low-grade sort, whereas the across-the-line packing contemplated by Appellee in 1968 would have represented illegality of a high-grade sort and consequently he had to take action (Jurisdiction Statement, p. 7 through p. 8):

> "Even after the 1965 amendment, the appellant has allowed small amounts of cantaloupes to be shipped out of the State in bulk, and therefore not in 'closed standard containers approved by the supervisor.' The appellee itself was permitted to ship in bulk 400 acres of cantaloupes harvested from its Parker ranch in 1967. Stipulation, Exhibit B. Aside from this shipment, however, all of the shipments in violation of the 1965 amendment to the Act were by small shippers and in comparatively insignificant amounts. *Ibid.*"

This argument certainly does not commend itself to reason, and, we respectfully submit, is hardly the kind

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was, or what its effect, if any, would have been on the matters involved in this case. Neither the bill nor any of the matters above mentioned were in evidence in the Court below and have no part in the matter before this Court. The only reference in the Stipulation of Facts to any Bill in the Arizona Legislature is to the effect that the minutes of the meeting of the Arizona Vegetable Growers Association attended by Appellant show the following:

> "Those minutes state that current legislation before the Arizona Legislature was discussed at the meeting. Two bills were discussed. The first concerned the use of DDT and the second the bulk movement out of the State of vegetables and melons. The minutes state that the DDT Bill was referred to a Committee of the Association for further study, and that as to the latter bill, no formal action was taken by the Board." (Stip. p. 25, L. 9-16)

of argument which can have much appeal to this Court. In point of fact, the amount of cantaloupes shipped in years prior to 1968 across the State line was not at all insignificant. As Appellant's own official reports will show, they were quite comparable to the volume of shipments in 1968, but this is entirely beside the point, because if an act is illegal, it is illegal regardless of its size or scope. If it is illegal to transport 500 acres of cantaloupes across the State line into California for processing and packing, it is equally illegal to transport 300 acres or 200 acres or 100 acres.

We would rather suggest, as we did in the Court below, that Appellant's practice of permitting interstate shipments in years prior to that here in question was entirely legal, and his interpretation of the statute to permit such interstate transport was lawful and proper. We submit this long-continued practice of the administrative officer charged with administration of the law should be given effect in this case. We submit this is called for under Appellant's own line of argument on page 13, where he states:

> "In the instant case, the governing rule of statutory interpretation is that which prescribes that 'When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agencies charged with its administration.' *Udall v. Tallman,* 380 U.S. 1, 16 (1965). *Udall v. Tallman* arose in the context of a federal statute, but the principle is equally applicable to interpretation of state statutes, particularly where upsetting the administrative officer's interpreta-

tion is potentially as disruptive as in the instant case."

With this principle we agree. It is to be applied, however, with respect to the statutory interpretation which the Administrator has applied consistently and uniformly over a period of years, not to an interpretation which represents a sudden, abrupt, and arbitrary switch from the long-continued practice and interpretation upon which he has caused interested parties to rely.

5. The decision below followed earlier decisions of this Court.

The decision of the three-judge court was in keeping with established precedents of this Court. There is no contrary decision of this or of any other court presenting a conflict which needs to be resolved by this Court.

Some of the earlier decisions are cited in the opinion of the court below. Included are cases which parallel the facts of the present case very closely.

For example, there is the case of *Toomer v. Witsell,* 334 U.S. 385 (1948) where the Supreme Court had under review a statute of South Carolina which required that all boats licensed to troll for shrimp in the State's waters were to dock at South Carolina ports and unload, pack and stamp their catch there before shipping or transporting it to any other State. Certain shrimp fishermen wanted to take their catch into the State of Georgia, where they had their own facilities for processing and packing. They brought action against the South Carolina officials charged

with enforcement of the statute, seeking an injunction on constitutional grounds based on the Commerce Clause, as in the present case. The matter was heard before a three-judge Federal District Court, which upheld the statute and denied an injunction. The Supreme Court reversed, holding that the statute tended to cause an undue burden on interstate commerce in violation of the Commerce Clause and was therefore invalid and unenforceable.

Mr. Chief Justice Vinson, in his opinion stated:

> "The record shows that a high proportion of the shrimp caught along the South Carolina coast, both by appellants and others, is shipped in interstate commerce. There was also uncontradicted evidence that appellants' costs would be materially increased by the necessity of having their shrimp unloaded and packed in South Carolina ports rather than at their own docking, warehousing, refrigeration and packing facilities. In addition, an inevitable concomittant of a statute requiring that work be done in South Carolina, even though that be economically disadvantageous to the fishermen, is to divert to South Carolina employment and business which might otherwise go to Georgia; the necessary tendency of the statute is to impose an artificial rigidity on the economic pattern of the industry" *(Id.* at 404).

The *Toomer v. Witsell* case presented the strongest possible case for State control because of the recognized common law property interest of the State in its fish and game. Notwithstanding this, the Supreme Court found that the State could not impose conditions on shipments out of the State so as to burden interstate

commerce. The Court laid heavy stress on "the importance of having commerce between the forty-eight States unimpeded by local barriers" and upon the principle "that State restrictions inimical to the Commerce Clause should not be approved simply because they facilitate in some measure" enforcement of the State law (*Id.* at 406).

Foster-Fountain Packing Company, Inc. v. Haydel, 278 US 1 (1928), also presented a case whose facts closely parallel those of the present case. There, an official of Louisiana attempted to prohibit the transportation of shrimp out of the State of Louisiana, unless the hulls and heads had first been removed in the State of Louisiana. His action was based on the Louisiana Shrimp Act. The plaintiff, which had its processing facilities in the State of Mississippi wanted to take the shrimp out of the State of Louisiana and have them packed in Mississippi. Although the State of Louisiana had a strong common law property right in its fish and game (a feature which is not present in the instant case), the Supreme Court held that the prohibition of transportation of shrimp out of the State unless their hulls and heads had been first removed in Louisiana was unreasonable and imposed an undue burden upon commerce. The officer charged with enforcement of the Louisiana law argued that the purpose of the Act was conservation, but the Court held that in its practical operation, the law resulted in an impermissible direct burden upon interstate commerce. The Court held that the actual purpose of the Louisiana Shrimp Act was not to re-

tain the shrimp for use
but rather to favor the
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Johnson v. Haydel, 278 U
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quirements of the Commerce Clause, it would open the way for every State in the Union to take similar action for its protection. This would then have the effect of imposing an "artificial rigidity" on commerce between the states in direct contravention of the intent of the Framers of the Constitution, who recognized that the free flow of commerce and trade among the several states was essential to the success of our federal form of Government. We respectfully submit the factors which motivated the Framers to adopt this basic policy find even stronger ground today.

The above decisions are in line with other decisions of this Court to the effect that advancement of local economic interests (as distinguished, for example, from safeguarding the public health and safety of the State) cannot serve as a justification for impeding the free flow of commerce between the States. *Dean Milk Co. v. City of Madison, Wis.,* 340 U.S. 349 (1951); *H. P. Hood and Sons v. Du Mond,* 336 U.S. 525 (1949). In the latter case this Court said:

> ". . . it is only additional restrictions, imposed for the avowed purpose and with the practical effect of curtailing the volume of interstate commerce to aid local economic interests, that are in question here . . . ." (*Id.* at 530)
>
> "The state may not promote its own economic advantages by curtailment or burdening of interstate commerce." (*Id.* at 532)[2]

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[2]That the purpose of the Act was to serve economic interests and economic interests only is clear. The Stipulation of Facts (p. 3, L. 21-26) states: "Accordingly, the purposes for the enactment of Arizona's Fruit and Vegetable Standardization Act were

Indeed, this Court has consistently held that a State statute which, by its necessary operation, directly interferes with or burdens interstate commerce is a prohibited regulation and invalid, regardless of the purpose for which it was enacted, and will not be permitted to stand. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935); *Foster Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928); *Johnson v. Haydel*, 278 U.S. 16 (1928); *Schafer v. Farmers Grain Company*, 268 U.S. 189 (1925); *Lemke v. Farmers Grain Co.*, 258 U.S. 50 (1922).

In *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. *supra* at 552, this Court stated:

> "It is the established doctrine of this Court that a state may not, *in any form or under any guise*, directly burden prosecution of interstate business" (italics supplied).

and further, at page 522:

> "If one state in order to promote the economic welfare of her farmers may guard them against competition from another state the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation."

At page 10 of his Jurisdictional Statement, Appellant states:

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to promote and develop Arizona fruits and vegetables in interstate and foreign commerce and to enhance the return to the producers of fruits and vegetables within this State."

Appellant's reference to this Stipulation as relating only to the purpose of enhancing the reputation of Arizona produce (p. 6, 24) clearly does not reflect the full stipulation, but avoids the last part.

> "The problem from the appellee's standpoint is thus strictly an economic one: under the Act, appellee cannot ship its cantaloupes unless they have been inspected; they cannot be inspected by the appellant unless they are packed in Arizona; and they cannot be packed except in a packing shed."

It is apparent that the effect of Appellant's interpretation, as applied to this case, according to Appellant himself, is three-fold:

(1) Appellee's cantaloupes must be packed in the State of Arizona.

(2) They must be packed in a packing shed situated in Arizona.

(3) Appellee must construct such a packing shed in Arizona.

Appellee would necessarily have to comply with all three requirements in order to be permitted to ship its cantaloupe crops in interstate commerce.[3]

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[3]At page 9 of the Jurisdictional Statement, Appellant makes certain statements which are not supported by the record. Thus, for example, he states: "The parties stipulated at the oral argument before the district court that cantaloupes can be inspected for the defects proscribed by the statute only at the packing stage," citing Transcript of Hearing of November 15, 1968, p. 70-71. Examination of those pages will disclose that this was not the stipulation at all. What appears there is simply that "the inspection best takes place at the stage of sorting, when the cantaloupes are sorted, and at the present time this can most conveniently and efficiently be done in the packing shed." Accordingly, this statement hardly suggests that inspection can take place *only* at the packing stage, but relates solely to convenience and efficiency.

Appellant makes the statement that inspection for quality defects at a stage other than the packing stage "would be inordinately disruptive to the shipper's operations and impossible for

The implications of such requirements in light of this Court's prior decisions referred to above were noted by the three-judge Court in the hearing before it. The following colloquy took place between Court and counsel for Appellant (Transcript of Proceedings of November 15, 1968, p. 36, L. 12 to p. 38, L. 13):

> "Judge Merrill: I have a little trouble, I must confess, with the legitimacy of the state interest in that unless it is being packed in Arizona.
>
> Mr. Lee: Well——
>
> Judge Merrill: Now, suppose it is being packed in California, what legitimate state interest has Arizona once the fruit has left the State? It would have a legitimate interest in fruit coming into the state——
>
> Mr. Lee: No question.
>
> Judge Merrill: —if it is sold to Arizona consumers. But I must confess I have a little difficulty in the legitimacy of the state's interest as to produce which is going to be sold interstate, and whether, if you assert such an interest, you are not categorizing or separating out an area of interstate commerce with which you have this concern, and if you are not really separating out interstate commerce for the purpose of regulating interstate commerce as distinguished from your regulation of intrastate commerce.

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the inspector to accomplish." The record contains no evidence whatever on this point.

Appellant also states that inspection of cantaloupes to determine compliance with the standardization laws "simply is not carried out in this State or any other State" except at the time cantaloupes are sorted and packed. There is no evidence whatever in the record as to how the inspection of cantaloupes is carried out in other states, except in California; and, of course, as already indicated, there is no basis for the further statement on page 9 that the "sorting and packing must be accomplished at the packing shed."

Mr. Lee: All right. Let me answer that in two parts. Of course, that is the whole case and in the answer to that particular question you solve this lawsuit. And there are essentially two answers to it, and they are both supported, in my view, Judge Merrill, and I cannot see a meaningful difference, they are both supported by square holdings of the United States Supreme Court.

The first one is that as long as you assert the regulation at a stage which involves some processing prior to shipment in interstate commerce, that is not interstate commerce. That is point number one.

And the second point is——

Judge Merrill: Still subject to the problem that I have of being able to regulate it, if it takes place——

Mr. Lee: Yes, I suppose that's true.

Judge Merrill: —distinguished from the insistence that it should take place.

Mr. Lee: Yes, I suppose that's true, because then you would be in the Toomer v. Witsell, Baldwin v. Seelig category.

Judge Merrill: *I wonder if you have any authorities, such as the shrimp cases, which would recognize your right to insist that certain processes take place in the state rather than the right to regulate those processes which actually do take place?*

Mr. Lee: *No, I don't think you will find, to be perfectly candid, I don't think you will find any statute or any case which will say that any state has the right to insist that certain processes take place in the State of Arizona. I think that is a Baldwin v. Seelig violation of the Constitution.*

> Judge Merrill: *I must confess that I have a little trouble seeing that you are not asking that"* (italics supplied).

We respectfully submit Appellant has presented no grounds which would raise a substantial question concerning the three-judge Court's application of the above-mentioned cases and principles to the facts of this case. Indeed, the colloquy between Court and counsel for Appellant set forth above reflects a necessary recognition of this.

6. Collateral arguments of Appellant do not present issues of required substantiality.

In his Jurisdictional Statement, Appellant refers to miscellaneous matters, presumably with the thought of intimating or suggesting to the Court (we will not say "advocating", because Appellant's presentation of certain of these points does not suggest he himself considers he is on solid ground) that there may be substantial issues involved calling for a further hearing by this Court. Actually, they are not issues in the case at all, certainly not substantial ones.

(a) One such matter is Appellant's reference to the laws of other states. At page 11, Appellant states:

> "The substantiality of the federal issue is compounded in the instant case by the fact that the lower court's holding has cast a shadow not only over the enforcement procedures of Arizona's Standardization Act, but also over those of all other states which have adopted standardization laws in an attempt to enhance the long-run reputation of their states' produce . . . the district

> court has necessarily held that where enforcement of a state's agricultural standardization laws would be impossible without requiring possible expenditures of money by certain farming corporations, enforcement of standardization laws under such circumstances is unconstitutional."

Then Appellant cites references to the laws of 17 states having "a standardization act of some kind."

This line of argument, we respectfully submit, attempts to raise issues where none actually exist. It is amply clear that the court below did not have before it the laws of these other states (with the exception of California, where the packing in this case was accomplished). The laws of these other states were not in issue. These laws did not enter into the pleadings. They were not subject of discussion or mention in the Stipulation of Facts. There was no showing of any kind in the court below what the terms and provisions of these laws are, their purpose, scope, or intent. There was no showing at all as to the interpretation or application of any such "standardization law" (or what a so-called "standardization law" is) in terms of shipments out of state in interstate commerce or how they would be interpreted or applied to facts and circumstances such as exist here. Actually, it would appear that these laws are not being interpreted to apply to interstate shipments at all. The Illinois statute, for example, expressly so provides, thus giving recognition, in statutory form, to the proposition enunciated by the three-judge court in this case:

> "No provision of this Act shall apply or be deemed to apply to foreign or interstate commerce excepting insofar as may be permitted by the constitution of the United States, the Acts of Congress and the treaties made thereunder, nor to transactions subject to the provisions of the 'Perishable Agricultural Commodities Act, 1930." § 161, Chapter 5, Smith-Hurd Illinois Annotated Statutes (1966).

For other examples, see § 2314, Title 15, Burns Indiana Statutes (1964); and § 5-5-1, Title 5, Utah Code (1953).

The fact is that neither party considered these "other" laws relevant to the issues tried and heard by the court below and they were not involved in any way. No mention of any such laws was made except for the general passing reference to them in Appellant's brief below, now repeated in the Jurisdictional Statement.

To argue that the decision of the court below "has cast a shadow" on these "other" statutes is, we submit, absurd.

Equally absurd, we submit, is the suggestion that the court below held to the broad, general principle stated by Appellant, namely, that "the district court has necessarily held that where enforcement of a state's agricultural standardization laws would be impossible without requiring possible expenditures of money by certain farming corporations, enforcement of standardization laws under such circumstances is unconstitutional" (p. 12). Not only does this state-

ment involve assumptions not based on record evidence (viz., impossibility of enforcement), but, we submit, is a complete distortion of the court's decision. To undertake to demean the court's decision and deprive it of the dignity to which it is entitled in the eyes of this Court by casting it in a farcical mold hardly commends Appellant's arguments to serious consideration, we respectfully submit.

Appellant's contention that these "other" laws (which includes California) have relevance here is most difficult to reconcile with the position taken by Appellant below, both at the hearing and in briefs, that the law of California, which closely parallels the law of Arizona, was totally irrelevant to the issues. Indeed, this position is expressed also in the Jurisdictional Statement, where Appellant finds it fits in with his then line of argument: "The existence or nonexistence and similarity or lack of similarity of a standardization law in California are therefore irrelevant" (footnote, p. 25).

If the law of California, after which the Arizona law "was patterned" (Appellant's Jurisdictional Statement, p. 12) is irrelevant, what possible relevance can the laws of the other states have?

We respectfully submit, the laws of the "other" states have no bearing upon the question of substantiality before this Court.[4]

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[4]Simply as an exercise, we have investigated the laws of the 16 other states cited by Appellant. We find, first of all, that Appellant's references are not to "standardization" laws as such, but to the entire body of state statutes relating to agriculture in most of the named states. For example, Florida Statutes An-

(b) Also having no bearing on the issue here, we respectfully submit, is the "abstention" doctrine to which Appellant refers in a footnote, page 13. The fact that the court below undertook in its opinion, to consider this question preliminary to the exercise of its sound discretion (*Burford v. Sun Oil Co.*, 319 U.S. 315, 318 (1943)), certainly does not afford Appellant any ground for complaint. He asserts he "might have requested the lower court to abstain in order to allow opportunity for the state courts to pass on this issue" (footnote, p. 13). The issue before the Court was whether the State Supervisor of Inspection, acting under color of authority of a state statute, could constitutionally forbid Appellee from transporting its produce out of the state into California for processing and packing. If Appellant

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notated, Title 33, and Idaho Code, Title 22, relate to "Agriculture, Horticulture and Animal Husbandry". Smith-Hurd Illinois Annotated Statutes, Chapter 5, Burns Indiana Statutes, Title 15, and Tennessee Code, Title 43, deal with "Agriculture and Horticulture".

Although each of the cited statutes is of a similarly broad scope, composed of many chapters and subchapters covering diverse subjects related to agriculture, our research shows that many of them do not include anything which could be properly classified as a "standardization act" similar to or even comparable to the Arizona Fruit and Vegetable Standardization Act. No "standardization" provisions at all were found in the cited statutes of Indiana, Iowa, Tennessee or Wyoming.

Although the remaining statutes cited did contain some provisions of a "standardization" type, they have special provisions which on their face raise serious questions whether they would have any application under facts such as we have here. Indeed, as noted in the text above, certain statutes contain express provisions to the effect that they have no application to produce in interstate commerce.

In *none* of the cited statutes of these 16 other states was there found any requirement that produce grown in the state be packed in standard containers in a packing facility within the state, before being transported out of the state.

wanted to urge the Court to refrain from deciding the issue, it was open to him at all times to do so. He never did so—at any stage. Indeed, Appellant affirmatively sought an adjudication by the Court. Appellant stipulated to the Court's jurisdiction, to the fact that Appellee had no adequate remedy at law, to the fact that failure to enjoin Appellant would cause Appellee irreparable loss and damage, to the fact that the issue was not rendered moot by completion of the 1968 harvest but was a continuing issue needing to be resolved (Stip. p. 1, L. 25-27, p. 23, L. 20-32). It was only after the Court's unfavorable decision that Appellant first began to mention abstention (Motion for Rehearing and/or Clarification, dated February 4, 1969).

Appellant apparently recognizes the weakness of his position on this point since he concludes "At this stage of the proceedings, we do not feel that abstention should now be an issue . . ."

With this statement we agree. Appellant's dissatisfaction on this point should not be considered as having any bearing on the question of substantiality.

(c) Appellant poses as an issue in this case the question whether his regulatory act affects interstate commerce at all. Thus, he states as a question (Jurisdictional Statement p. 5):

> "Whether, under this Court's decisions in *Federal Compress and Warehouse Co. v. McLean,* 291 U.S. 17 (1934) and *Chassaniol v. City of Greenwood,* 291 U.S. 584 (1934) the strictures of the commerce clause are even relevant, since the regu-

lation occurs and is terminated prior to the time that the regulated goods move in interstate commerce;"

The assertion that "the regulation occurs and is terminated prior to the time that the regulated goods move in interstate commerce" is without any support whatever in the facts of this case, which show most clearly that

(1) Appellee is an interstate grower and shipper, almost all of whose products are packed, sold and shipped in interstate commerce, including the cantaloupes here in question; and that these products are expressly grown for shipment, intended to be shipped, and are in fact shipped to markets throughout the Nation and in foreign commerce.

(2) Due in large part to the highly perishable nature of the product, the process of harvesting, hauling to shed, processing, packing and shipping of the cantaloupes is one continual, uninterrupted and rapid movement, accomplished in a matter of a very few hours, as indicated above. The product literally never comes to rest. It is not stored or warehoused, as in the cases cited by Appellant. It enters the stream of interstate commerce the very moment that it is severed from the ground.

(3) Appellant in the present case is not seeking to regulate an activity which Appellee is performing in the state. He is seeking to prevent *movement* itself, movement of the cantaloupes from Parker across the state line to Blythe. The cantaloupes are then already

on their way in the stream of commerce as part of the continuous process above described.

(4) The effect of Appellant's order, if Appellee were not to be prohibited from sending its products forth into the stream of commerce, is to require Appellee to engage in certain affirmative acts in the State of Arizona, including performing the processing and packing of its products there, doing the processing and packing in a packing shed located in Arizona, and constructing a packing shed in Arizona for such purpose—notwithstanding the existence of facilities used by Appellee for performing all the foregoing at Blythe, under similar standards and procedures, and in the same containers, as are used in Arizona.

We respectfully submit the activity involved in this case is clearly part and parcel of the flow of interstate commerce, and to contend that the issue is one of a substantial nature requiring further review by this Court is to engage in a fruitless task of attempting to draw fine lines not in accord with present-day business realities. We submit this position is amply supported by the cases we have already cited and discussed above.

The *Federal Compress* and *Chassaniol* cases cited by Appellant are basically different and wholly distinguishable from the present case. In those cases, the so-called regulatory act in question was the levy of a local tax on goods (cotton) which had come to rest in a warehouse where they could sit for a long time before entering the stream of commerce. This was the

subject of great stress by the Court in the *Federal Compress* case, 291 U.S. 17, at 21):

> "It is clear that by all accepted tests the cotton, while in appellant's warehouse, has not begun to move in interstate commerce, and hence is not a subject of interstate commerce immune from local taxation. When it comes to rest there, its intrastate journey, whether by truck or by rail, comes to an end. . ."

In the present case, the cantaloupes have not come to rest in Arizona, but are on their way to California.

Cotton, unlike cantaloupes, is not a perishable commodity, and it is apparent from a reading of the *Federal Compress* case, supra, that the normal course of business in dealing with cotton is for it to be transported to a warehouse, where it comes to rest, is stored, and sometime later is compressed and sent on into the stream of interstate commerce. On the other hand, cantaloupes, as a highly perishable commodity, cannot be allowed to come to rest and be stored at any stage of their journey from the field to market, without seriously endangering their quality and marketability. They must immediately be set in motion to their ultimate destination (Stip. p. 8, L. 17-20).

In the *Federal Compress* case, the statement is made: "Before shipping orders are given, it has no ascertainable destination without the state. . . ." 291 U.S. at 21). Conversely, in our case the cantaloupes being transported by Appellee do have an ascertainable destination without the state, which is Appellee's packing facility at Blythe, California. Further, the

Federal Compress case makes note of the fact that the cotton is "withdrawn from transportation", whereas there is no such withdrawal in the case of Appellee's cantaloupes. They must immediately be carried from the field to market in the most expeditious manner.

We may point out, as is well known to the Court, that the National Labor Relations Board and other federal regulatory agencies have taken jurisdiction over transportation of goods such as are involved in the present case, on the basis that interstate commerce has come into play. The National Labor Relations Board has taken jurisdiction over employer-employee relations in the area, which is reflected in labor contracts between growers and shippers and teamsters, for example.

The fact is that even the packing operation itself is under similar National Labor Relations Board jurisdiction, and the packing process is indeed a phase of interstate commerce. We respectfully submit the *Federal Compress* and *Chassaniol* cases are of little aid in relation to the facts of this case.[5]

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[5]The same is true of *Parker v. Brown*, 317 U.S. 341 (1943), which involved a prorate activity only, affecting without discrimination all area producers and wholly intrastate in nature, as the Court stressed. It did not involve goods in process of moving to market. The goods in *Parker v. Brown*, as in the *Federal Compress* and *Chassaniol* cases, were goods in storage and could have been so for long periods of time. The Prorate Act, it may be noted moreover, was one expressly sanctioned and collaborated in by the Federal authority as being a conservation measure, consistent with the federal objectives under the Agricultural Marketing Act and the Agricultural Adjustment Act.

Appellant attempts to distinguish the cases of *Lemke v. Farmers' Grain Co.*, 258 U.S. 50 (1922), and *Shafer v. Farmers'*

(d) Appellant seeks to support his petition for review by variously characterizing the lower court's decision as "cryptic" p. 25), "cryptic in the extreme" (p. 12), and "devoid of any discussion" (p. 21)—as though a court is constrained to embody its views in opinions of a length and scope satisfactory to the litigants. Not only are these criticisms unfounded, but they ignore the fact that the Court's decision was based upon a detailed Stipulation of Facts drawn up by the parties themselves and came after a full and complete hearing in which the Court went into every aspect of the case—law and facts—with counsel. (See Transcript of Proceedings, November 15, 1968).

Grain Co., 268 U.S. 189 (1925), relied on by us. We respectfully submit that in so doing Appellant serves only to emphasize our point. Appellant must necessarily concede these cases hold that a state cannot regulate the purchase of grain where the grain is intended for prompt shipment outside of the state. Appellant suggests this applies to cases where the goods are to leave the state without processing. Without going into the question whether those decisions are to be so narrowly construed, we need merely point out that no processing of the goods in the present case is taking place in Arizona either. Rather, the goods are in the act of being shipped out of the state for processing.

Appellant cites the case of *Sligh v. Kirkwood*, 237 U.S. 52 (1915) as one which he believes to support his position. This case is wholly distinguishable from the present case, however. In *Sligh* there was involved a statute making it an offense to handle citrus fruits unfit for human consumption and injurious to health, and the statute was upheld by the court. In the present case, we are not dealing with goods unfit for human consumption and there is no suggestion whatever that Appellee is packing or shipping any such product. We are dealing here with an absolute prohibition of the transport of Appellee's products across the state line into California even though wholesome, uncontaminated and, as Appellant himself has admitted, of a superior quality among cantaloupes. Moreover, it is a product which has undergone an inspection by Appellant's own inspectors at the field and which has been *certificated* by Appellant himself for the boundary crossing, after which it is subjected to a rigid inspection by the California inspectors (Stip. p. 13).

Appellant complains that the Court's decision is "*completely* devoid of any reasoning or guidelines" which the Appellant might use as the basis for determining how he might properly "go about protecting his interests" (p. 25), when it is commonly known and understood that the court's function is to decide cases, not to tell the litigants how to circumvent their decisions. Actually, the Court's decision does not preclude Appellant from utilizing any means of carrying out appropriate inspections desired by him which will not constitute an undue burden upon interstate commerce. Appellant is already carrying out inspections in the field, and various other procedures discussed during the course of the proceedings and known to Appellant are available.

Appellant complains further that the Court's decision "is not the product of skill in the law of the State of Arizona" (p. 13). By what process of reasoning Appellant is able to make such an assertion is not at all clear when it is considered that the panel of three judges consists of men who literally grew up among the farms and packing houses of Arizona and California; who, as practitioners before the Bars of Arizona, California and the federal courts, acquired a close familiarity with the laws of those jurisdictions; who, as such practitioners, unquestionably had to deal with the problems of the farmers among whom they lived, and with farming practices and farming methods; and who, in their careers and capacities as judges, have undoubtedly devoted much of their time and thought to matters relating to farmers

and farming. Indeed, we can conceive of no circumstance which could more effectively clothe the judicial authority with skill and expertise in this field. We respectfully submit this intimate understanding of the practical and legal aspects of the subject matter is clearly reflected in the questions and remarks of the three judges at both hearings. (See Transcript of Proceedings, June 7, 1968, and Transcript of Proceedings, November 15, 1968.)

Appellant complains also that "unless the decision of the lower court is reviewed by this Court, it will not be reviewed at all . . ." (p. 26). Appellant is here merely begging the question. The fact that the decision below went against him does not in itself entitle him to review under the rules of this Court. Substantiality of a degree warranting a further plenary hearing must be shown, which we submit Appellant has failed to do. Furthermore, Appellant's argument ignores the fact that he has already had the benefit of a full hearing—not by a single judge, but by a panel of three judges, that the hearing was based on facts drawn up and stipulated to by Appellant himself and presented by him to the Court, that the hearing afforded Appellant an opportunity to go into all pertinent facets of the case and that the facts and issues were, indeed fully reviewed, that Appellant has presented to the three judges and they have considered not less than two successive motions for rehearing, and that the decision rendered by them consistent with prior decisions of this Court has been unanimous.

We respectfully submit Appellant's complaints have no relation to the question of substantiality before the Court and are not entitled to any weight in consideration of that question.

III

CONCLUSION

This Court has long followed a policy of strict necessity in disposing of constitutional issues. *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288 (1936).

We respectfully submit, for the reasons set forth above, that Appellant has failed to show that there exist issues of such substantiality as to require further hearing by this Court, and that Appellee's Motion herein to Dismiss or Affirm should be granted.

Dated, August 15, 1969.

Respectfully submitted,
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